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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 299

MARS, INCORPORATED, PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion, findings of fact, conclusion of law, and decree of the District Court (R. 20) are reported in 49 F. Supp. 533. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 647) is reported in 135 F. (2d) 843.

JURISDICTION

The decree of the United States Circuit Court of Appeals for the Eighth Circuit was entered May 7, 1943 (R. 672). A petition for rehearing

was denied on May 27, 1943 (R. 687). The petition for a writ of certiorari was filed in this Court on August 27, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether proof of shipment weights of millions of candy bars as shown (1) on invoices for all shipments during the base pricing period established by the Regulation, and (2) on invoices for shipments subsequent to the effective date of the Regulation, was properly received in evidence as proof, respectively, of petitioner's base-period weights and subsequent unlawful weight reductions, where the invoice weights were average carton weights, expertly and disinterestedly determined and daily checked and verified.

2. Whether a showing (1) that price increases in the form of weight reductions had occurred, and (2) that the defendant manufacturer was able to control its weights within the range of weight reductions thus shown, was a sufficient *prima facie* showing of violation so that, assuming the relevance of evidence purporting to excuse the weight reductions on the basis of technical factors or wartime shortages peculiarly affecting defendants' manufacturing operations, the burden of proof as to these possible excuses in an injunction proceeding rested on the defendant manufacturer.

3. Whether the injunction decree is subject to the construction that it obliges petitioner to sell candy bars at prices lower than the maximum legal prices.

4. Whether the injunction compels changes in petitioner's business in contravention of section 2 (h) of the Act.

STATUTE AND REGULATION INVOLVED

The case involves the Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 50 U. S. C., Appendix, Supp. II, Sec. 901 *et seq.*)[1] and the General Maximum Price Regulation (7 Fed. Reg. 3153) issued thereunder on April 28, 1942.

The pertinent provisions of the Act are set forth in the Appendix, *infra,* pp. 26–27.

The General Maximum Price Regulation, issued three months after the adoption of the Act, extended comprehensive maximum price control to virtually all commodities subject to the Act. It applies to both retail and wholesale sales. The method of control established is that of the "base period" maximum price. Each seller's prices are fixed at the highest prices which he charged during a designated base period, to wit, the month

[1] The Act was renewed by the amendatory Act of October 2, 1942 (56 Stat. 765, Sec. 7 (a), 50 U. S. C., Appendix, Supp. II, Sec. 961 *et seq.*), the original expiration date being thereby extended from June 30, 1943, to June 30, 1944. The amendatory Act is not otherwise applicable.

of March 1942 (Sec. 2 (a)). Records of base period sale prices are required to be prepared and maintained by all sellers (Sec. 11 (b)). The Regulation became effective as to wholesale or manufacturing sellers on May 11, 1942 (Sec. 23).

The pertinent provisions of the Regulation are the following:

> SECTION 1. *Prohibition against dealing in commodities or services above maximum prices.*—On and after the effective date of this Regulation, regardless of any contract or other obligation:
>
> (a) No person shall sell or deliver any commodity, * * * at a price higher than the maximum price permitted by this Regulation; * * *.
>
> * * * * *
>
> SEC. 2. *Maximum prices for commodities and services: General provisions.*—Except as otherwise provided in this Regulation, the seller's maximum price for any commodity * * * shall be:
>
> (a) In those cases in which the seller dealt in the same * * * commodities * * * during March 1942:
>
> The highest price charged by the seller during such month—
>
> (1) For the same commodity * * *.
>
> * * * * *
>
> For the purposes of this Regulation, the highest price charged by a seller "during March 1942" shall be:

(a) The highest price which the seller charged for a commodity delivered * * * by him during March 1942; * * *.

SEC. 11. *Base-period records.*—Every person selling commodities * * * for which, upon sale by that person, maximum prices are established by this Regulation, shall:

* * * * *

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for such of those commodities * * * as he delivered or supplied during March 1942 and his offering prices for delivery or supply of such commodities * * * during such month, together with an appropriate description or identification of each such commodity * * *;

* * * * *

SEC. 20. *Definitions and explanations.*—This Regulation, and the terms appearing therein, unless the context otherwise requires, shall be construed as follows:

* * * * *

(d) *Delivered.*—A commodity shall be deemed to have been "delivered" during March 1942, if during such month it was received by the purchaser or by any carrier, including a carrier owned or con-

trolled by the seller, for shipment to the purchaser.

* * * * *

(m) *Records.*—"Records" includes books of account, sales lists, sales slips, orders, vouchers, contracts, receipts, invoices, bills of lading, and other papers and documents.

As applied in the present proceeding, the provision in Section 2 (a) of the Regulation that no seller may charge a higher price for a commodity than he charged for the "same" commodity in March 1942, means not only that the monetary price may not be increased, but also that a prohibited price increase may not be accomplished by reducing the weight or quantity of the commodity.[2] It is to be noted also that the base period price established as the maximum legal price is that charged for commodities "delivered" in March 1942; and that the Regulation defines the term "delivered" as receipt by the purchaser or by a carrier for shipment to the purchaser.

STATEMENT

Pursuant to section 205 (a) of the Act, the Administrator filed his complaint in the District Court on December 14, 1943 (R. 1), following an extensive investigation of petitioner's business

[2] This obvious meaning of the Regulation was early confirmed by official interpretations of the Administrator, OPA Service 11 : 1026 *et seq.*

and records (R. 48–49). The complaint was in two counts. The first averred that Mars, Inc., was engaged in the business of manufacturing candy bars and selling them in box and carton quantities (24 bars to a box, 12 boxes to a carton) to commercial purchasers exclusively, freight prepaid; that the price, size, weight, and ingredients of all the candy sold and delivered by the company during March 1942, the base pricing period established by the Regulation, remained constant throughout the entire month; that, in violation of the Regulation and the Act, the company materially reduced the weights of candy manufactured, sold, and delivered by it on and after May 11, 1942, the effective date of the Regulation, without a corresponding reduction in price; that this uncompensated weight reduction amounted to approximately eleven percent; and that the company would continue these unlawful weight practices unless restrained (R. 1–3). The second count averred that the company, in violation of the Regulation and the Act, had failed to prepare and maintain a true and correct statement of its ceiling prices together with an appropriate description of the commodities sold and delivered during the March 1942 base period, in that it had incorrectly listed the base period weights at weights less than the true ones (R. 3). The complaint prayed for broad permanent and interlocutory injunctive relief re-

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straining the company from charging prices in excess of those established by the Regulation and from otherwise violating any Regulation under the Act establishing maximum prices for the company's candy products, and directing the company to prepare and maintain a proper statement of ceiling prices; and for other "just and proper" relief (R. 3–4).

The company in its answer denied all the essential allegations of the complaint which charged violations of the law (R. 9–14).

After a trial, the district court entered an opinion, findings of fact, and conclusion of law (R. 20–27) and denied injunctive relief (R. 28). On appeal, the decree was reversed. The circuit court of appeals ordered the issuance of an injunction (1) restraining petitioner from selling its candy products at prices in excess of the maximum legal prices established by the Regulation and (2) directing petitioner to prepare and maintain a proper statement of its ceiling prices as shown by its base period records (R. 671–672). The injunction as so ordered was entered by the District Court on June 29, 1943, and continues in effect.[3]

For an understanding of the extent to which the issues raised are factual, and the extent to which the courts below concurred in resolving the issues (see pp. 18–20, *infra*), it is necessary to set

[3] The injunction order is not a part of the present Record.

forth a résumé of the essential evidence and contentions of the parties.

1. *The company's manufacturing processes and shipping practices.*—Mars, Inc., is one of the largest and most successful candy manufacturing companies in the world, with gross annual sales of $20,678,464.33 in 1941 (R. 334) and an estimated gross of 20 percent more in 1942 (R. 277), representing sales of approximately 900,000,000 five-cent bars in 1942 (R. 188, 334). The company's products, while manufactured for the retail candy trade in the form of individually wrapped five-cent bars of six varieties (R. 335), are sold and shipped to wholesalers and retailers in carton lots of 288 packaged bars, each carton containing 12 boxes, each box containing 24 individual bars (R. 270–272, 348–499). Thus, the business of this company is that of a wholesale producer shipping and selling its products in standardized wholesale quantity lots.

The candy manufacturing plant operated at Chicago, Illinois, by Mars, Inc., is a model of efficiency and precision in the control of the manufacturing process at all its stages (R. 47–104, 118–144), including control over the weight and composition of its products. The company has also achieved utmost efficiency and precision in its cost accounting and production formula analysis methods, with its calculations customarily carried out to the fifth decimal point (Pl. Exs.

40 to 89, Tr. 944 to 1242).[4] The company's control over its production processes is shown by the proof that upon entry of a temporary restraining order against the company on December 14, 1942 (R. 5), it was able within three days to bring about the mathematically precise change in *gross* weights (i. e., including packaging) required for a return to the gross March weights shown by the Administrator (R. 283–284; Pl. Ex. 16, column of weights for March 1–31 and for December 17 and 18, R. 333; Pl. Exs. 11, 12, and 13, R. 322–329).

As is set forth *infra,* pp. 16–17, the company claimed that it encountered wartime shortages with regard to white sugar, cocoanut oil and chocolate. Subsequent to January 10, 1942 (Pl. Exs. 40, 41, Tr. 944–950) and also subsequent to April 25, 1942 (Pl. Exs. 55, 56, Tr. 1033–1039), the company increased the proportion of corn syrup in its formula to compensate for a reduction in the amount of white sugar. This change did not in any way affect the amounts of other ingredients contained in the products. Again, on April 16, 1942, the Company instituted the use of a refined soybean oil (Kelko) (R. 268–269) as a substitute for the previously used cocoanut oil, both being commonly described as "hard butter." This substitution did not result in any manufacturing

[4] The parties have stipulated (R. 689–691) for the omission of certain record matter below from the present printed Record, with the right reserved to refer here to the original record pages of matter so omitted (designated "Tr.").

difficulties, as is apparent by reference to lines 15, 16 of Plaintiff's Exhibit 90, for weeks of April 13–18 and April 20–25, 1942 (R. 500). The exhibit shows that the Company maintained weights identical with those maintained in the two weeks preceding the use of the substitute oil and that in no instance during this period was it necessary to change the quantities of other ingredients in order to maintain its weights. The company used the substitute oil in exactly the same amounts as the previously used cocoanut oil.

Striking examples of the Company's precise control, unimpaired by wartime shortages, are furnished by Plaintiff's Exhibits 90 to 95 (R. 500–505), which show the formulae for all six of the company's bars in the period December 21 to 26, 1942, following the entry of the temporary restraining order against the company. As appears from the last line of Exhibit 90 (R. 500), the "Milky Way" bar manufactured in that period carried 10 percent less chocolate coating and approximately 18½ percent less white sugar than during March 1942 and carried Kelko in the same amount as cocoanut oil during March 1942. Despite these changes in ingredients the company produced the finished product at the same average weight as during March 1942. The example is duplicated in the Record with respect to the company's other five bars: "Snickers" bar (last line, Pl. Ex. 91, R. 501); "Forever Yours" bar (last

line, Pl. Ex. 94, R. 504); "Dr. I. Q." bar (last line, Pl. Ex. 95, R. 505); "The 3 Musketeers" bar (last line, Pl. Ex. 92, R. 502); "Mars" bar (last line, Pl. Ex. 93, R. 503).

2. *Sources of the Administrator's proof of weight changes.*—The Administrator's proof of weight changes was taken from the company's own records, namely the unimpeached invoices and bills of lading in evidence (R. 348–499; Tr. 537–943). The invoices established the shipping weights in the base period, March, 1942; a separate and individual inspection of each and every March, 1942, invoice formed the basis of this phase of the Administrator's proof (R. 68–69, 145). The invoices also showed the accumulation of violations on and after May 11, 1942, the effective date of the Regulation.

Further, the Administrator showed that the shipping weights inscribed on the invoices and bills of lading were weights computed for the company at frequent and periodic intervals by the Western Weighing and Inspection Bureau (R. 104–112), under a contract between the Bureau and the company (R. 346), subject to daily check and actually so checked by the company itself (R. 86–87) and uniformly used by the company as its shipping weights and as the basis of its payments of millions of dollars in railroad freight charges over a period of many years. When weight changes were made by the company, it notified the Bureau, asking for a special certi-

fication of the changes (R. 106), and the changes are noted in the records prepared by the Bureau and by the company (e. g., R. 298–300, 322–324; R. 325–328). The Administrator put in evidence the records of these weight determinations, paralleling and tying in with the invoice records of actual shipments and shipment weights (R. 291–331).

The weight determinations were made by expert employees of the Western Weighing and Inspection Bureau, whose method of operations was careful and accurate in the highest degree. The weighing procedure followed gave weights of one, two, three, and four cartons, then the weight of five cartons including the four previously weighed, then another weight of five cartons, and finally four weights of ten cartons. Thereafter an *average* weight was reached by adding the weights of all the cartons so checked and dividing by fifty, the total number weighed. This process was done separately for each type of bar. In this manner average weights were computed which accurately represented individual carton weights. Accurate average figures for individual bar weights were computed by deducting the weights of packaging and wrapping materials, and dividing the resultant net carton weight by 288, the number of bars per carton. (R. 56–57, 64–65, 94–96, 104–112, 291–331, 520 et seq.; Tr. 534.)

Finally, the Administrator introduced "formula cost sheets" or "cost sheets" prepared in the company's offices, disclosing certain statistical data as to changing weights of raw ingredients from time to time (Tr. 1075–1242), and bearing a consistent relationship to the actual shipping weights as disclosed by the invoices and bill as lading (R. 520–548).[5]

3. *Changes in price and weight.*—The first price or weight change by Mars, Inc., shown in the Record was an increase of 6.25 percent in the price per box of 24 bars, i. e., from 64 cents to 68 cents, on September 25, 1941, the box price thereafter remaining at 68 cents down to the time of the trial (R. 143). Subsequent weights and weight changes are shown in Tables A to G, inclusive (see Appedix, pp. 27–31, *infra*).

Tables A, B, and C show shipping weight reductions from December 1941 through January 1942. These are not set forth, of course, as instances of violation, but as evidence of the systematic character of weight reductions in the company's products and its ability to control the weight. As reduced on January 21, 1942, effecting gains to the company of more than 19 percent on the two leading bars since the price increase of September 25, 1941, and substantial

[5] Reference to data contained in these "cost sheets" and analyses there was made heretofore, pp. 9–12, *supra*, in our statement of the Administrator's proofs on the issue of the company's ability to control weights.

gains on the other bars, the weights continued without further change until April 1, 1942. Table D (p. 29, *infra*) shows the weights during the March 1942 base period, as disclosed by the 10,000 invoices for all shipments during that month (R. 68–69, 145). After the base period, but before May 11, 1942, the effective date of the Regulation, two interim weight reductions occurred, on April 1, 1942, and May 1, 1942 (Tables E and F, pp. 29, 30, *infra*).

Reductions after May 11, 1942, constituting violations of the Regulation and Act, are shown in Table G, *infra*, p. 31. Because of the detail in the data, only the figures for the largest-selling bar are shown; similar tables for the additional bars were submitted in the brief in the court below. The dates given are illustrative only, taken from the more complete evidence in the record. The Table shows decreases ranging to almost 10 percent of the base-period weight.

After the restraining order of December 15, 1942, the weights were restored to the March 1942 amounts (R. 333; Cf. R. 322–328 with R. 350–355).

4. *The Administrator's proof under Count 2.*— As heretofore noted, Count 2 of the complaint alleged that the company failed to maintain a true statement of its ceiling prices as required under Section 11 (b) of the Regulation (*supra*, p. 5), in that it made false statements as to its March 1942 weights. The Administrator

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showed that the company's ceiling price records (R. 347) were false in that the March weights indicated thereon were, in fact, less than the actual weights (see Tables D and G, pp. 29, 31, *infra,* and the exhibits from which they are derived).

5. *The company's contentions.*—The company sought to establish that weight reductions in its products might be attributable to "uncontrollable variations" in individual and average weights (Pet. 20, par. (5)) due to variations in manufacturing tolerances, moisture absorption, and dehydration of carton and other container materials, and substitution of new ingredients for, or reduction in the use of, certain ingredients rendered scarce by reason of the war (R. 225–228, 238–241, 244–251, 264–270, 272–276). The purport of this explanatory matter was apparently to demonstrate that the company's manufacturing processes were impossible to control as to finished weights within the limits of the weight reductions shown to have occurred subsequent to May 11, 1942 (R. 198–224, 235–242, 244–255, 584–589, 591, 592). The explanatory matter thus offered by the company was contradicted, as seen, by the Administrator's proof that the company maintained a scientifically precise control of its manufacturing processes, and that this control was not diminished by the alleged disturbance occasioned in the company's opera-

tions by wartime material shortages (see pp. 9–12, *supra*). Further, the company's claims regarding the effect of moisture conditions upon carton materials would in any event account for only an insignificant part of the weight reductions shown (R. 182–185).

The company also sought to establish that no reduction below its March, 1942, weights had in fact occured. The contention giving rise to the "greatest dispute" (Pet. 18–19) was that a weight reduction was effected on March 31, 1942, during the base period. Under the Regulation (*supra*, pp. 5–6), the base weight must be that of a commodity "delivered" or received by a carrier "for shipment to the purchaser" during March, 1942. The company's contention in this regard rested primarily upon the oral testimony of one of its shipping employees (R. 185–194),[6] and was not supported by documentary evidence, but was in conflict with the documentary proofs covering *all* March shipments. The oral testimony offered by the company on this point was limited to the claim that cartons at the lower weights were placed in a common carrier on March 31, with

[6] An employee of the Western Weighing and Inspection Bureau (Tranker), a witness called by the Administrator, testified that he saw candy weighed by him at new weights on March 31 loaded into a freight car on the company's siding on that date. He was unable to testify that the car departed or that the candy was otherwise shipped for "delivery" to a purchaser on that date (R. 111–112).

no showing as to the destination of the alleged shipment, whether to a buyer or to one of the warehouses used by the company[7] (R. 263–264; compare Deft's Ex. 4, R. 550). The lower March 31, 1942, weights thus claimed by the company were identical with certain actual shipping weights which the Administrator acknowledged were used on April 1, 1942, but not prior thereto (R. 477 *et seq.*). The further contention was made that, accepting the Administrator's position regarding the March, 1942, weights, no reduction occurred thereafter. The company offered the testimony of one of its officers to the effect that a random sampling (made by him on a basis not explained) of 120 bars of all six types manufactured after the effective date of the Regulation showed weight increases over the March base period weights shown by the Administrator (R. 250–255). Testimony was also introduced by the company purporting to show that the Administrator's use of average shipping weights was improper on the ground that such weights were inaccurate as averages because not determined with sufficient exactness, and also on the ground that these average shipping weights did not correspond with a few specific instances of actual weights (R. 194–198, 259–260, 265, 550).

[7] The statements in the petition (pp. 16, 65) that there is "not one iota of testimony in the record that petitioner owned any warehouses" or "had any warehouse at Dallas nor at Newark in March of 1942" must be taken to refer to ownership as distinguished from use.

6. *Findings and conclusions of the courts below.*—On the issue whether the company had effective control over average weights, the district court found in the affirmative (R. 22; Fdg. 2, R. 26), and the circuit court of appeals concurred (R. 659–661).

On the issue whether the weight reductions actually resulted from the exercise of such control, the district court reached no conclusion, but held that the burden of showing purposeful change rested on the Administrator, and that the conclusion, if established, would not be significant (R. 22–23). The circuit court of appeals held that the burden of accounting for the reductions otherwise than by deliberate change rested on the company (R. 655–656).

On the issue of the minimum weights for March 1942, the district court accepted figures close to those contended for by the company (Fdg. 6, R. 26–27). The circuit court of appeals held that this finding rested on an improper evidentiary basis, and that, as the Administrator maintained, the March 1942 invoices should have been used (R. 667–670).

On the issue whether weight reductions below the March 1942 level were proved, the district court found in the affirmative, though the amounts found were less than those contended for by the Administrator, in view of the court's treatment of the March 1942 base (R. 23–24, 26–27). The circuit court of appeals, accepting the Administra-

tor's base-period evidence, necessarily held that greater reductions had been established than found by the district court (R. 661–662, 667–670, 671).

On the issue whether the use of average shipping weights was proper, both courts ruled that it was (R. 22, 26–27; 663–667, 670).

The district court's refusal to issue an injunction was based on its view that the weight of petitioner's products might be reduced without violating the law, unless, perchance, the change was as "palpable" as the cutting of a bar in half and its sale as two bars (R. 23–24). The circuit court of appeals held that a decrease in the weight of a food such as candy is equivalent to an increase in price (R. 654–655), and that an injunction should have been issued even on the basis of the weight reductions found by the district court (R. 662).

ARGUMENT

Petitioner does not now deny that weight reductions in its products, such as the reductions here involved, constitute in substance price increases, as the Administrator has consistently ruled. See note 2, page 6, *supra*. Petitioner's contentions are in the main addressed to the factual issues in the case and present no question calling for further review.

The essential facts were found against petitioner by both courts below, and those findings

will be accepted here. *Electric Storage Battery Company* v. *Shimadzu*, 307 U. S. 5, 9. Both courts found that weight reductions below the applicable base-period weights had been established. Petitioner's evidence concerning a sampling of individual bars (p. 18, *supra*) was thus not persuasive. Both courts accepted proof of average shipping weights, and thus rejected the contention that these were not accurately determined. Both courts likewise found that petitioner was able to control the weight of its products within the limits of the changes found either by the district court or by the circuit court of appeals.

In one particular the circuit court of appeals rejected the findings of the district court as clearly erroneous, that is, the findings with respect to the specific weights during the base period. The reasons for that rejection are fully set forth in the opinion below (R. 667–670). Petitioner argues (Pet., pp. 8–9, 55, 58) that the circuit court of appeals fell into confusion in rejecting the district court's use of the Western Weighing and Inspection Bureau certificates while itself adopting the invoice records which rested on such certificates. The confusion, however, is not the court's. The court preferred the invoices to the certificates, not because of any supposed difference in their sources, as the opinion shows (R. 667–668, 669), but because the invoices alone were competent to show "delivery," and for

the date March 31, 1942, that factor was critical.[8]

The court below properly held, for the reasons stated by it (R. 655–656), that petitioner had the burden with respect to explaining demonstrated weight changes on the ground of uncontrollable variations in manufacture and materials. The court did not hold, as petitioner argues (Pet., pp. 14–16, 23) that the burden was on it to prove its innocence. Moreover, it is submitted that even if the burden of proof on the issue involved was on the Administrator, the burden was met by the evidence demonstrating petitioner's ability systematically to control the weight of its products (pp. 9–12, *supra*).

The courts below did not err in relying on evidence of average shipping weights. The weight determinations were made regularly by the Weighing Bureau at the instance of petitioner, were careful and thorough, and were subject to a daily "spot check" by petitioner itself. Weight changes were specially certified by the Bureau and by petitioner. See pp. 12–13, *supra*. The nature of petitioner's enterprise is such that a high degree of standardization is required, which is a standard based on a highly accurate average. No injury results from the employment of an average test for weights in this case. If petitioner were en-

[8] Even if petitioner's asserted base weights were accepted, substantial violations were proved. Table H, *infra*, p. 32, relating to the largest-selling bar, shows reductions below petitioner's asserted base exceeding five percent.

titled to take as its base weight the lightest bar or carton delivered in March 1942, it would follow that after the effective date of the Regulation the lightest weights would similarly be controlling. The use of averages for both periods fully compensates for the refusal to take the lightest weights during the earlier period. Moreover, the nature of this type of case is such that documentary proof must be resorted to in lieu of the actual weighing of individual items which have long since been distributed and consumed. Effective price control for nondurable products would be impossible if it were necessary to secure proof of current weights, much less base-period weights, by going back of the regular records to the physical products themselves.

Petitioner contends (Pet. 54) that the decree, in enjoining it from selling at prices above those shown on its invoices and bills of lading for March 1942, requires it to sell at prices lower than the base-period prices, because, it is argued, if a single carton should drop below the invoice weight for the base period the injunction would be violated. It is argued, in short, that a minimum weight must now be maintained equal to the average weight in March 1942. These apprehensions rest upon an unfounded construction of the decree. The obvious meaning of the decree, as the Administrator will recognize in possible enforcement proceedings, is that the average shipping

weights must not drop below the average shipping weights for the base period.

Petitioner contends, finally (Pet. 11–14, 56–58), that the decree involves changes in business practices in violation of Section 2 (h) of the Act. The requirement that it maintain its average shipping weights at the March 1942 level should not, however, entail any departure from its practices during the base period, when its average shipping weights remained constant, as indeed they did for the preceding period from January 21, 1942, to March 1, 1942 (pp. 14–15, *supra*). The requirement that it maintain accurate records should likewise occasion no material departure, in view of the flexibility of petitioner's practice in the preparation of invoices, which were capable of being written within a day after a new weight determination (R. 312, 484). The decree simply gives effect to the applicable Regulation; and the Regulation has not been attacked, nor could it be in this proceeding, in view of Section 204 (d) of the Act.[9]

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[9] The contention (Pet. 9–11) that there was a fatal variance between pleadings and proof was disposed of by the court below (R. 652), and its holding was clearly correct. See Rule 15 (b), Rules of Civil Procedure; *United States* v. *Cushman*, 136 F. (2d) 815 (C. C. A. 9); *Anderson* v. *Hershey*, 127 F. (2d) 884 (C. C. A. 6).

CONCLUSION

The decision below is correct and presents no question meriting review by this Court. The petition should be denied.

Respectfully submitted.

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DECEMBER 1943.